In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-886

SALVATORE THOMAS BADALAMENTE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that he was prejudiced by the government's failure to make Jencks Act material available to him, that he was not afforded the effective assistance of counsel at trial, and that the standard adopted by the court of appeals for assessing counsel's effectiveness conflicts with that applied in the District of Columbia Circuit.

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiracy to transport forged bank passbooks and forged certificates of deposit in interstate and foreign commerce, in violation of 18 U.S.C. 371 and 2314.[1] The court of appeals affirmed (Pet. App. A), and denied rehearing (Pet. App. B).

[1]The two-count indictment charged petitioner and six co-defendants with conspiracy and with the substantive offense of transporting in interstate commerce a forged savings and loan association passbook and a forged certificate of deposit. The government subsequently dismissed the substantive charge against petitioner, and dismissed the charges against co-defendant Feeney. Co-defendants Allen, Berardelli, and Turi pled guilty. At petitioner's trial, Yagid and Stern were found guilty as charged (Pet. App. A 2a-3a). Yagid appealed with petitioner, and the court of appeals reversed his conviction (Pet. App. A 4a-11a).

The pertinent facts are set forth in the opinion of the court of appeals (Pet. App. A 4a-6a): Herbert Olsberg testified that in March 1973 co-defendant Yagid approached him about the possibilities of using a fictitious bank passbook as collateral for a loan. Olsberg said that he would have to see the passbook. Olsberg then communicated this information to the FBI and became a paid informer. Shortly thereafter, Yagid and co-defendant Stern introduced Olsberg to co-defendants Allen and Berardelli, the latter being the purported holder of the passbook. Olsberg said that if the passbook was "good" he would probably take it to Switzerland. They discussed how the proceeds would be split, Yagid and Stern saying that they would have to discuss that matter with their "partner who sits across the river." Thereafter, Yagid took Olsberg to Fort Lee, New Jersey, to meet the partner, and introduced him to petitioner. They discussed the plan and the proposed split of the proceeds. In April, following instructions from Yagid and Berardelli, Olsberg met co-defendant Turi at the Newark airport and went to a nearby motel where he saw the purported passbook and certificate of deposit of a Texas savings and loan association, which Turi had brought with him. Federal agents then arrested Turi and subsequently arrested the other co-conspirators, thereby aborting the scheme.

Co-defendant Allen testified for the government that Berardelli suggested the passbook deal to him in the summer of 1972 and brought the matter up again in January or February 1973. Allen communicated with Yagid and Stern about the possibility of obtaining a loan through them, and he arranged for them to meet Berardelli. Following a further conversation with Yagid about the plan in March, Allen met with Berardelli, Yagid and Stern and was introduced by them to Olsberg. Subsequently, Allen met these four again (Pet. App. A 6a).

1. On the appeal of co-defendant Yagid, the court of appeals reversed and remanded for a new trial because the government had failed to produce certain documents bearing on the reliability of the testimony of co-defendant Allen, who, testifying for the government, contradicted Yagid's claims of entrapment and withdrawal (see Pet. App. A 4a-9a). Petitioner claims that, in declining to grant him a new trial too, the court of appeals has given an unduly "narrow" or limited effect to this Court's decisions in *Jencks* v. *United States*, 353 U.S. 657, and *Brady* v. *Maryland*, 373 U.S. 83.

To the contrary, the court gave those decisions full effect in reversing Yagid's conviction. The court's refusal to reverse petitioner's conviction was based on the sound conclusion that he was not prejudiced by the government's conduct. Petitioner concedes that Allen's testimony did not implicate him. That testimony did not significantly add to the other proof of the existence of a conspiracy, a matter that petitioner conceded below was amply established (Pet. App. A 11a-12a, n. 3). The only real issue at trial as to petitioner was whether he was aware of the unlawful purposes of his co-defendants—an issue on which Allen's testimony shed no light (see Pet. App. A 12a-15a). The court's ruling that petitioner was not prejudiced does not warrant further review.[2]

2. Petitioner reiterates the claim, rejected by the court of appeals, that he was denied effective assistance of counsel because his retained trial attorney (1) had a conflict of interest with the attorney for co-defendants Yagid and Stern, (2) represented co-defendant Turi, who pled guilty

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[2]Petitioner made no attempt to raise this issue in the court of appeals until after the court's decision, in his petition for rehearing; in his brief on the merits in the court of appeals (copies of which we are lodging with the Clerk) he repeatedly acknowledged the existence of a conspiracy involving his co-defendants (*e.g.*, Br. 4, 16, 31-32).

before trial, and (3) was incompetent in (a) failing to object to several continuances requested by other counsel (a potential witness having died in the interim), (b) failing to press for production of certain records concerning Olsberg, and (c) failing to move for a new trial before being discharged by petitioner.

The court of appeals found no factual basis in the record for petitioner's assertion that his trial attorney and the attorney for his co-defendants were partners (Pet. App. A 16a); saw no reason to believe that counsel's failure to call Turi as a witness reflected a decision in Turi's, but against petitioner's, interest (*id.* at 16a-17a); and concluded that, whether viewed singly or collectively, the other actions were either reasonable defense decisions or, in any event, not prejudicial (*id.* at 17a).

Petitioner's claim of a conflict between the standard stated by the court of appeals in assessing the adequacy of petitioner's representation (*ibid.*)—which is essentially the standard used in other circuits[3]—and the different language used in *United States* v. *DeCoster*, 487 F.2d 1197 (C.A. D.C.) (Pet. 15-17), does not warrant review, for the represention in question here was adequate under the latter standard too. As the court recognized in *DeCoster*, an appellate court ought not "to second guess strategic and tactical choices made by trial counsel." *Id.* at 1201.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1975.

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[3] *Herring* v. *Estelle*, 491 F.2d 125, 127-128 (C.A. 5); *United States* v. *Martin*, 489 F.2d 674, 677-678 (C.A. 9); *Matthews* v. *Wingo*, 474 F.2d 1266, 1268-1269 (C.A. 6), certiorari denied, 411 U.S. 985; *Bruner* v. *United States*, 432 F.2d 931, 933 (C.A. 10); *Allen* v. *VanCantfort*, 436 F.2d 625, 630-631 (C.A. 1), certiorari denied, 402 U.S. 1008; *Cardarella* v. *United States*, 375 F.2d 222, 230-232 (C.A. 8), certiorari denied, 389 U.S. 882.